Supreme Court, U.S.
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No. 02-1004 OCT 29 2002

In the

Supreme Court of the United States

OFFICE OF THE CLERK

KIMBERLY A. RICH,

Petitioner,

versus

CITY OF ONTARIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does the procedural safeguard of a prompt administrative decision on an application for a permit to engage in speech protected by the First Amendment, as promulgated by the Supreme Court of The United States in *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734 (1965) and *FW/PBS v. City of Dallas*, 493 U.S. 215, 110 S.Ct. 596 (1990), apply to a municipal code requiring a permit before a sign may be displayed?

II. Is the procedural safeguard of a prompt judicial review required if a licensing agency of a municipality simply does not grant or deny a permit thereby placing the applicant in application purgatory?

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OPINIONS AND ORDERS ENTERED BY THE COURT

The final judgment of the United States Court of Appeals for the Ninth Circuit affirming the decision of the United States District Court for the Central District of California was entered on June 1, 2001. (App. 1a).

The order of the United States Court of Appeals for the Ninth Circuit denying Appellant Rich's Petition for Rehearing was entered on July 30, 3001. (App. 16a).

This petition for writ of certiorari is filed within ninety (90) days from that date. 28 U.S.C. Section 2101(c).

BASIS FOR JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS, RULES OF CIVIL PROCEDURE AND ORDINANCES INVOLVED

United States Constitution, Amendment I provides, in part, that:

> "Congress shall make no law . . . abridging the freedom of speech[.]"

United States Constitution, Amendment XIV provides, in part, that:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of

law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Code of Civil Procedure § 1094.08 provides:

(a) Notwithstanding anything to the contrary in this chapter, an action or proceeding to review the issuance, revocation, suspension, or denial of a permit or other entitlement for expressive conduct protected by the First Amendment to the United States Constitution shall be conducted in accordance with subdivision (d).

(b) For purposes of this section, the following definitions shall apply:

(1) The terms "permit" and "entitlement" are used interchangeably.

(2) The term "permit applicant" means both an applicant for a permit and a permit holder.

(3) The term "public agency" means a city, county, city and county, a joint powers authority or similar public entity formed pursuant to Section 65850.4 of the Government Code, or any other public entity authorized by law to issue permits for expressive conduct protected by the First Amendment to the United States Constitution.

(c) A public agency may, if it so chooses, designate the permits or entitlements to which this section applies by adopting an ordinance or resolution which contains a

specific listing or other description of the permits or entitlements issued by the public agency which are eligible for expedited judicial review pursuant to this section because the permits regulate expressive conduct protected by the First Amendment to the United States Constitution.

(d) The procedure set forth in this subdivision, when applicable, shall supersede anything to the contrary set forth in this chapter.

(1) Within five court days after receipt of written notification from a permit applicant that the permit applicant will seek judicial review of a public agency's action on the permit, the public agency shall prepare, certify, and make available the administrative record to the permit applicant.

(2) Either the public agency or the permit applicant may bring an action in accordance with the procedure set forth in this section. If the permit applicant brings the action, the action shall be in the form of a petition for writ of mandate pursuant to Section 1085 or 1094.5, as appropriate.

(3) The party bringing the action pursuant to this section shall file and serve the petition on the respondent no later than 21 calendar days following the public agency's final decision on the permit. The title page of the petition shall contain the following language in 18-point type:

"ATTENTION: THIS MATTER IS ENTITLED TO PRIORITY AND SUBJECT TO THE EXPEDITED HEARING AND REVIEW PROCEDURES CONTAINED IN SECTION 1094.8 OF THE CODE OF CIVIL PROCEDURE."

(4) The clerk of the court shall set a hearing for review of the petition no later than 25 calendar days from the date the petition is filed. Moving, opposition, and reply papers shall be filed as provided in the California Rules of Court. The petitioner shall lodge the administrative record with the court no later than 10 calendar days in advance of the hearing date.

(5) Following the conclusion of the hearing, the court shall render its decision in an expeditious manner consistent with constitutional requirements in view of the particular facts and circumstances. In no event shall the decision be rendered later than 20 calendar days after the matter is submitted or 50 calendar days after the date the petition is filed pursuant to paragraph (4), whichever is earlier.

(e) If the presiding judge of the court in which the action is filed determines that, as a result of either the press of other court business or other factors, the court will be unable to meet any one or more of the deadlines provided within this section, the presiding judge shall request the temporary assignment of a judicial officer to hear the petition and render a decision within the time

limits contained herein, pursuant to Section 68543.8 of the Government Code. Given the short time period involved, the request shall be entitled to priority.

(f) In any action challenging the issuance, revocation, suspension, or denial of a permit or entitlement, the parties to the action shall be permitted to jointly waive the time limits provided for herein.

Ontario Code of Ordinances, Article 31 (Signs), Section 9-1.3105 (Application)[1]:

Except for signs expressly exempted by the provisions of § 9-1.3110 of this article, no signs shall be erected, constructed, attached affixed, or maintained on any property, except in conformity with the provisions of this article. It shall be illegal to use, occupy, or maintain property in violation of this article. Any violation or failure to comply with the provisions of this article shall render a person guilty of such violation and such person shall be punished in accordance with the Chapter 2, Title 1 of the Municipal Code. In each instance and under the same conditions to which this chapter permits any sign, a sign containing an ideological, political, or other non-commercial message and constructed to the same physical dimensions and character shall be permitted.

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[1] The entire Ontario Sign Ordinance can be found in Ontario Code of Ordinances, Title 9, Chapter 1, Part 6, Article 31, and is included in the Appendix.

Ontario Code of Ordinances, Article 31 (Signs), Section 9-1.3177 (Street Banners) provides that:

> (a) No person, either as principal, agent, or otherwise, shall hang or suspend any street banner, flag, pennant, or street decoration over and above any street or other public thoroughfare, or cause the same be done, unless permission to do so has first been obtained from the Council. . . . Upon receipt of the written permission of the Council, the Chief Building Official shall, upon receipt of the required application thereof, issue a permit for the erection and maintenance of such sign according to the terms of the Council permission.
>
> (b) Exceptions.
>
> (1) The provisions of this section shall not apply to any sign or advertising matter lettered upon the surface of any awning; provided, the awning is securely attached to the building[.]
>
> (2) The provisions of this section shall not apply to approved economic development promotional banner programs applied for by civic organizations created or incorporated to promote the economic development and/or business growth of the City. Such organizations as may be approved by the City Council, and including but not limited to the Ontario Chamber of Commerce and the Downtown Ontario Business and Professional Association, may submit a sign program application to the Development Agency for purposes of implementing a promotional banner program which would utilize City light standards in the public right-of-way. Such

promotional banner program may include the name of an individual firm, business, or corporation who sponsored the banner(s). The sponsors name shall be secondary and subservient to the main intent of the banner which is to promote economic development messages (i.e.: "Shop Ontario") to the general public. Such promotional programs shall be reviewed by the Development Agency for design, location, placement, and safety considerations and shall comply with guidelines adopted by the Planning Commission from time to time.

Ontario Code of Ordinances, Article 31 (Signs), Section 9-1.3180 (Permits Required) provides that:

This section describes permits required for various types of signs and the approving authority for signs.

(a) In addition to Sign Permits required by the Planning Department, described below, building permits may need to be obtained from the Building Department;

(b) Table 31-8 outlines Sign permit requirements, permitting authority, length of time allowed for temporary signs and appeal authority.[2]

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[2] Table 31-8 — Sign Permit Requirements and Approval Process is included in the Appendix.

STATEMENT OF THE CASE

Kimberley A. Rich ("Rich") is an individual who was doing business as Outdoor Media Dimensions. Rich submitted seven (7) written sign applications to the City of Ontario on November 13, 1999 as required by Article 31 (Signs), Section 9-1.3180 (Permits Required). The applications were denied on November 13, 2001.

Rich filed suit in the United States District Court, Central District of California. The Complaint asserted a facial and an as applied challenge to the City of Ontario's Sign Code arguing that the Code violated Rich's First Amendment Rights, as applied to the City of Ontario through the Fourteenth Amendment. Rich filed her Complaint alleging, it part, that the City of Ontario's licensing scheme for signs constitutes an unlawful prior restraint.

Rich's case was brought under 28 U.S.C. § 1983. The United States District Court, Central District of California had jurisdiction over the subject matter pursuant to 28 U.S.C. § 1331 and 1343.

The City of Ontario filed a Motion To Dismiss under Fed. R. Civ. P. 12(b)(6) contending that, as a matter of law, there exist no requirement of prompt decision on an application for a sign permit or prompt judicial review should a permit be denied or neither denied or granted.

Rich filed her Opposition brief arguing, among other things, that the City of Ontario's ordinances regulating signs constitutes an unlawful prior restraint because the procedural safeguards mandated by The United States Supreme Court in *Freedman v. Maryland*, 380 U.S. 51, 58-59, 85 S.Ct. 734, 738-39 (1965); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 110 S. Ct. 596 (1990), as well as the Court of Appeals for the Ninth Circuit in *Baby Tam & Co., Inc. v. City of Las Vegas*, 154 F.3d 1097, 1100-02 (9th Cir. 1998) are not present in the City of Ontario's licensing scheme.

The United States District Court, Central District of California granted the City of Ontario's Motion To Dismiss,

and Rich appealed to the United States Court of Appeals for the Ninth Circuit.

The United States Court of Appeals for the Ninth Circuit affirmed the United States District Court, Central District of California's decision in an unpublished opinion.

The United States Court of Appeals for the Ninth Circuit wrote, "In *Outdoor Systems, Inc. v. City of Mesa,* 997 F.2d 604, 609 (9th Cir. 1993), we addressed the facial constitutionality of sign permit regulations which, like Ontario's, did not contain any deadlines for decision. We wrote 'that the codes lack a time limit for the processing of [permit] applications is not fatal.' *Id.* at 613."

The United States Court of Appeals for the Ninth Circuit also held that the facial challenge to the absence of a time limit for judicial review is rendered moot by the enactment of California Civil Procedure Code § 1094.8.

The Ontario Municipal Code requires those seeking to erect new signs to obtain a permit from the City unless a proposed sign satisfies one of the enumerated content-based exemptions outlined in Article 31 (Signs), Section 9-1.3110 (Exempt signs -Noncommercial) or Article 31 (Signs), Section 9-1.3177(b) (Street Banners).

The City of Ontario's Muncipal Code does not require City officials to grant or deny a permit application within any specific time period. Furthermore, there exists no provision in the City of Ontario's ordinances requiring prompt judicial review of the City's approval, denial or failure to approve or deny an application for a sign permit.

California Civil Procedure Code § 1094.8 does require judicial review of an issuance, revocation, suspension or denial of a permit for a sign application, but does not provide for judicial review where an application has been filed, but a City official neither grants nor denies the application.

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Ninth Circuit's decision conflicts with a myriad of decisions of the United States Supreme Court concerning "prior restraints," specifically the requirement of procedural safeguards. *See e.g. FW/PBS, Inc. v. Dallas,* 493 U.S. 215, 110 S. Ct. 596 (1990)(applied Freedman to the regulation of "sexually oriented businesses, defined by the ordinance in that case as adult arcades, video stores, cabarets, motels, and theatres, escort agencies, nude model studios, or sexual encounter centers."); *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781 (1988)(professional fundraisers), *City of Lakewood v. Plain Dealer Publ'g Co.,* 486 U.S. 750, 108 S. Ct. 2138 (1988); *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 (1980) (striking statute on ground that it restrained speech for an "indefinite duration"); *Nebraska Press Association v. Stuart,* 427 U.S. 539, 96 S.Ct. 2791 (1976)(gag order limiting media in murder case); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558, 95 S. Ct. 1239 (1975)(required the safeguards in a denial of the use of a privately-owned theatre under lease to the city for the controversial musical production of Hair); *New York Times Co. v. United States*,403 U.S. 713, 714 91 S.Ct. 2140 (1971)(Pentagon Papers); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-51 (1969); *Freedman v. Maryland*, 380 U.S. 51, 57, 85 S.Ct. 734, 738 (1965)(quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, 83 S.Ct. 631, 639, 9 (1963)), *Near v. Minnesota*, 283 U.S. 697, 713, 51 S.Ct. 625, 630 (1931)(newspaper articles).

The Supreme Court of the United States granted certiorari in *City News And Novelty, Inc., Petitioner v. City Of Waukesha*, 530 U.S. 1249 (2000) to resolve the conflict that has arisen among the Courts of Appeal over the meaning of *FW/PBS*'s "prompt judicial review" requirement. *News And Novelty, Inc., Petitioner v. City Of Waukesha*, 531 U.S. 278, 121 S.Ct. 743, 746 (2001)

Although the Court was unable to resolve the conflict because the issue stemming from *Freedman* was not genuinely presented to the Court, *City News And Novelty, Inc., Petitioner v. City Of Waukesha*, 531 U.S. 278, 121 S.Ct. 743, 745-6 (2001), the Court repeated the procedural requirements necessary to guard against unconstitutional prior restraint of expression as including "prompt judicial review." *Id.* The Court went on to note that United States Court of Appeals are divided over the meaning of "prompt judicial review." *Id.* Some, like the Ninth and Fourth Circuits, have held that it means prompt judicial determination on the merits of the permit denied. Others, like the Fifth and Eleventh Circuits, have held that prompt access to court review suffices.

Regardless, the Supreme Court of the United States has never limited the application of the Freedman and FW/PBS safeguards to only certain types of prior restrains (i.e. permit requirements for adult businesses), and therefore the United States Court of Appeals for the Ninth Circuit's reliance on *Outdoor Systems, Inc. v. City of Mesa,* 997 F.2d 604, 609 (9th Cir. 1993) for the proposition that time limits for the granting or denying of sign permits is not necessary to comply with the Constitution of the United States is inconsistent with the opinions of the Supreme Court of the United States.

The Ninth Circuit's decision also conflicts with other recent decisions within the Ninth Circuit Court of Appeals. *See e.g. Baby Tam & Company, Inc. v. City of Las Vegas*, 199 F.3d 1111, 1115 (9th Cir. 2000); *Young v. City of Simi Valley*, 216 F.3d 807 (9TH Cir. 2000); *4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108, 1115 (9th Cir. 1999); *United States v. Linick*, 195 F.3d 538 (9th Cir. 1999); *Baby Tam & Co., Inc. v. City of Las Vegas*, 154 F.3d 1097 (9th Cir. 1998) and *Desert Outdoor Advertising v. City of Moreno Valley*, 103 F.3d 814, 818-19 (9th Cir. 1996).

I. THE DISPOSITION RENDERED BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT CONFLICTS WITH DECISIONS OF THE UNITED STATES SUPREME COURT, DECISIONS BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND OTHER CIRCUITS.

A. The Ninth Circuit's Decision To Affirm.

In deciding this case, the United States Court of Appeals for the Ninth Circuit first had to determine whether to rely on *Outdoor Systems, Inc. v. City of Mesa*, 997 F.2d 609 (9th Cir. 1993) or *Baby Tam & Company, Inc. v. City of Las Vegas*, 199 F.3d 1111, 1112 and 1115 (9th Cir. 2000)("*Baby Tam* II"); *Young v. City of Simi Valley*, 216 F.3d 807 (9TH Cir. 2000); *United States v. Linick*, 195 F.3d 538 (9th Cir. 1999); *Baby Tam & Co., Inc. v. City of Las Vegas*, 154 F.3d 1097, 1100-02 (9th Cir. 1998)("*Baby Tam* I") and *Desert Outdoor Advertising v. City of Moreno Valley*, 103 F.3d 814, 818-19 (9th Cir. 1996).

The Panel chose to follow *Outdoor Systems, Inc. v. City of Mesa*, 997 F.2d 609 (9th Cir. 1993). The Panel's dilemma was obvious. In *Outdoor Systems,* the Ninth Circuit held that the lack of time limits for processing a permit application is not fatal. *Id.* at 613. In *Baby Tam* I, the Ninth Circuit held that any prior restraint without procedural safeguards was unconstitutional.

Outdoor Systems dealt with a sign permit application that was denied. *Baby Tam* I dealt with an adult bookstore application that was denied. *Baby Tam* I at 1100-1102.

The issue is whether the principles enunciated in *Baby Tam* I, specifically the *Freedman* safeguards; apply to all protected speech cases, or only to "sexy speech" cases.

The Ninth Circuit applied the *Outdoor Systems* holding, as opposed to the *Baby Tam* I and II holdings, to the

present case and held that Rich's facial challenge fails because the fact that "'the codes lack a time limit for processing of [permit] applications is not fatal.'" (Memo. p. 2 (citing *Outdoor Systems, 997 F.2d at 613)).*

The Ninth Circuit's opinion in *Outdoor Systems* conflicts with decisions of the United States Supreme Court, and was not based on any legal analysis, but merely on the fact that the appellants in the *Outdoor Systems* case failed to raise the issue in their brief. The appellants in *Outdoor Systems* did not cite to supporting case law in either their brief or at oral argument and the Ninth Circuit was unable to find a case suggesting that the failure to specify the time period for processing permit applications renders a statute or ordinance invalid.

B. The Ninth Circuit Should Not Have Relied On *Outdoor Systems*.

The Ninth Circuit failed to correctly cite the basis for the holding in *Outdoor Systems Inc., v. City of Mesa*, 997 F.2d 604 (9th Cir. 1993) because it omitted pertinent language from the holding of case. In its Memorandum, the Ninth Circuit wrote:

> In Outdoor Systems, Inc. v. City of Mesa, 997 F.2d 604, 609 (9th Cir. 1993), we addressed the facial constitutionality of sign permit regulations which, like Ontario's, did not contain any deadlines for decision. We wrote, "[t]hat the codes lack a time limit for the processing of [permit] applications is not fatal." Id. at 613.

(Memorandum, p. 2).

The Ninth Circuit omitted extremely important language that put the aforementioned statement into context. In *Outdoor Systems*, Judge Clifford Wallace did write:

> That the codes lack a time limit for the processing of applications is not fatal. **Whiteco and Outdoor Systems have not cited one case, nor have we found any, which suggests that the failure to specify the time period for processing permit applications renders a statute or ordinance invalid.**

(Emphasis added).

The *Outdoor Systems* appellants failed to cite to *Freedman, Riley or FW/PBS* in their brief. The aforementioned cases, as well as *Baby Tam* I and II, should control this case.

In *Baby Tam I*, the Ninth Circuit made it clear that "a prior restraint exists when the enjoyment of protected expression is contingent upon the approval of government officials." *Id.* at 1100. Signs are protected speech. *See generally Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981); *City of Ladue v. Gilleo*, 512 U.S. 43 (1994); *Desert Outdoor Advertising, Inc. v. City of Moreno Valley*, 103 F.3d 814 (9th Cir. 1996); *National Advertising Co. v. City of Orange*, 861 F.2d 246 (9th Cir. 1998). No Supreme Court case has ever held that the "prior restraint" safeguards depend on the content or medium of the speech.

Although *Freedman, FW/PBS* and *Baby Tam I and II* don't deal with signs, these cases do address the broader issue of whether a government can require a speaker to obtain government approval before he can speak without procedural safeguards. *See FW/PBS; Riley v. National Federation of the Blind*, 487 U.S. 781, 108 S.Ct. 2667 (1988), *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 89 S.Ct. 935 (1969); *Desert Outdoor Advertising, Inc. v. City of Moreno Valley*, 103 F.3d 814 (9th Cir. 1996). Signs should be no different. The procedural safeguards should apply to the City of Ontario's sign permit process.

C. Sexy speech should not be entitled to more protection than signs, which include information concerning opinions, politics, goods and services.

The United States Supreme Court has repeatedly emphasized that prior restraints are *presumptively* unconstitutional. *Pittsburgh Press v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 93 S.Ct. 2553 (1973). The Court has stated, "Any system of prior restraint comes to the court bearing "a heavy presumption against its constitutional validity." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558, 95 S. Ct. 1239, (1975); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-51 (1969); *Freedman v. Maryland*, 380 U.S. 51, 57, 85 S.Ct. at 738 (1965)(quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, 83 S.Ct. 631, 639 (1963)).

The Court has tended to recognize only a narrow number of situations in which prior restraints might be permissible, such as restraints against obscenity, or to protect imminent threats to national security, or as a last resort to protect a defendant's right to a fair trial. *Smolla and Nimmer on Freedom of Speech*, § 15:7 (3rd ed. 1999). These exceptions are not present in this case.

In order to guard against the dangers inherent in prior restraint orders, especially those issued by nonjudicial licensing authorities, the Supreme Court has promulgated a number of procedural requirements. These procedural requirements have generally been applied in cases in which the licensing authority was attempting to suppress obscene materials, however, the requirements are applicable regardless of the subject matter of the speech as to which suppression is sought. *Smolla and Nimmer on Freedom of Speech*, § 15:64 (3rd ed. 1999)(citing *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 89 S.Ct. 347 (1968)(rally involving racist speech suppressed on ground it would tend to disturb or endanger citizenry); *National Fed'n*

of the Blind, Inc. v. Riley, 635 F. Supp. 256 (E.D.N.C. 1986), *aff'd without opinion*, 817 F.2d 102 (4th Cir. 1987), *aff'd*, 487 U.S. 781, 108 S. Ct. 2667 (1988)(statute requiring charitable organization to obtain an annual license lacked adherence to traditional procedural safeguards and was therefore facially unconstitutional)); *see also* Henry Monaghan, First Amendment "Due Process," 83 Harv L Rev 518 (1970).

The Supreme Court has stated that subjecting the exercise of First Amendment freedom to the prior restraint of a license without narrow, objective, and definite standards to guide the licensing authority is unconstitutional. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51, 89 S. Ct. 935, 938 (1969).

A legislative prior restraint must contain certain procedural safeguards to pass constitutional muster. The following three procedural safeguards are necessary to ensure expeditious decision making: (1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available and (3) the censor must bear the burden of going to court to suppress the speech, and must bear the burden of proof once in court. *Freedman*, 380 U.S. at 58-60. These are known as the "Freedman Safeguards."

The United States Supreme Court cases addressing prior restraints have identified two evils that will not be tolerated. First, a scheme that places "unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." *FW/PBS*, 493 U.S. at 225-226. Second, a prior restraint that fails to place limits on the time within which the decision maker must issue the license is impermissible. *Freedman*, 380 U.S. at 59; *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 (1980) (striking statute on ground that it restrained speech for an "indefinite duration"). "The failure to confine the time within which the licensor must make a decision contains the same vice as a statute delegating excessive administrative

discretion." *FW/PBS*, 493 U.S. at 227 (quoting *Freedman*, 380 U.S. at 56-57). The City of Ontario's sign code does not provide for a decision on an application within a brief, specified and reasonably prompt period of time.

In *Freedman*, the Court explained that the failure to place limitations on the time within which a decision maker must make a determination whether to grant or deny a license is a species of unbridled discretion. *Freedman*, 380 U.S. at 56-57 (failure to confine time within which censor must make decision "contains the same vice as a statute delegating excessive administrative discretion.").

Interestingly, the Ninth Circuit conceded the need for the second procedural safeguard mandated by *Freedman* – prompt judicial review. (Memo, p. 2). Other than relying on *Outdoor Systems, Inc. v. City of Mesa*, the Panel failed to explain why the second *Freedman* safeguard is necessary, but the first is not.

It is important to note that the *Outdoor Systems* court did not limit its holding to sign cases. Its opinion appears to stand for the proposition that the first *Freedman* safeguard is not necessary in cases involving the application for a permit before the speaker may speak. As noted above, this is not the law of the land.

The United States Court of Appeals for the Ninth Circuit incorrectly relied on *Outdoor Systems, Inc. v. City of Mesa*, 997 F.2d 604 (9th Cir. 1993) for the legal proposition that the failure to specify the time period for processing permit applications does not render a statute or ordinance invalid. Furthermore, the conflict between *Baby Tam* I and II and *Outdoor Systems* should be resolved in favor of *Baby Tam* I and II, which correctly state the principles articulated in *Freedman, FW/PBS, Riley* and the myriad of other cases cited above.

II. CALIFORNIA CODE OF CIVIL PROCEDURE § 1094.8 DOES NOT PROVIDE FOR JUDICIAL REVIEW IF A PERMIT APPLICATION IS NEITHER GRANTED OR DENIED WITHIN A SPECIFIED PERIOD OF TIME.

The United States Court of Appeals for the Ninth Circuit held, "Rich's facial challenge to the absence of a time limit for judicial review is rendered moot by the enactment of California Civil Procedure Code § 1094.8. It is not.

California Civil Procedure Code § 1094.8 provides judicial review where the "issuance, revocation, suspension, or denial of a permit or other entitlement for expressive conducted protected by the First Amendment to the United States Constitution" has occurred, but makes no provision for review if a permit is neither granted or denied.

There is absolutely no judicial review if the City simply fails to grant or deny a permit. Since there is no denial, there is nothing to have reviewed. An applicant can wait in perpetuity without the ability to have prompt judicial review of the permit because the City of Ontario's permit scheme does not provide for an automatic grant of a permit if it is not denied within a specified time frame.

The United States Court of Appeals for the Ninth Circuit incorrectly held that California Code of Civil Procedure § 1098.4 renders Rich's facial challenge to the absence of a time limit for judicial review moot because there exists no right to judicial review if the City neither grants or denies a license.

CONCLUSION

Rich respectfully requests that the Supreme Court of the United States grant a writ of certiorari to enable the Court to review the decision of the United States Court of Appeals for the Ninth Circuit that the procedural requirements noted above do not apply to sign permit schemes that amount to a prior restraint and that California Rule of Civil Procedure §

1094.8 provides sufficient judicial review even if it does not provide for review of a situation where permit is neither granted or denied, and simply lingers in permit application purgatory.

Respectfully submitted,

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No. 99-55958

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KIMBERLY A. RICH,
Plaintiff-Appellant,

v.

CITY OF ONTARIO, Defendant-Appellee.

February 16, 2001, Argued and Submitted, Pasadena, California

June 1, 2001, Filed

DISPOSITION:
AFFIRMED.

COUNSEL:
For KIMBERLY A. RICH, Plaintiff - Appellant: Michael D. Stein, Esq., Las Vegas, NV.

For KIMBERLY A. RICH, Plaintiff - Appellant: Alan R. Herson, Esq., Medford, OR.

For CITY OF ONTARIO, Defendant - Appellee: Kendall H. MacVey, BEST BEST & KRIEGER, Riverside, CA.

JUDGES:
Before: BEEZER, T.G. NELSON and BERZON, Circuit Judges.

OPINION:

The city of Ontario, California ("Ontario"), denied appellant Kimberly Rich's ("Rich") applications to display seven signs within city limits. Rich filed a complaint in district court which contained both a facial and an as-applied challenge to Ontario's sign permit regulations. The district court granted Ontario's motion to dismiss, and Rich appeals. We affirm.

Rich argues that Ontario's sign permit regulations violate her due process rights because the regulations lack reasonable procedural safeguards, thus allowing Ontario officials to exercise unfettered discretion to withhold sign permits. Rich specifically eschews any substantive First Amendment challenge to Ontario's sign code, maintaining instead that her facial and as-applied challenges are confined to the code's alleged lack of procedural safeguards.

Rich's facial challenge fails. In *Outdoor Systems, Inc. v. City of Mesa, 997 F.2d 604, 609 (9th Cir. 1993),* we addressed the facial constitutionality of sign permit regulations which, like Ontario's, did not contain any deadlines for decision. We wrote "that the codes lack a time limit for the processing of [permit] applications is not fatal." *Id. at 613.* Rich's facial challenge to the absence of a time limit for judicial review is rendered moot by the enactment of California Civil Procedure Code § 1094.8.

Rich's as-applied challenge also fails. First, as stated, Outdoor Systems does not require that sign permit codes contain any processing time limits. Second, despite the lack of any procedural safeguards in its sign code, Ontario expeditiously reviewed and denied her applications and Rich promptly filed for and received judicial review of the permit denials. Finally, we note that Rich's speech is of the type that may be entirely banned by a municipality. n1 See *Outdoor Sys., 997 F.2d at 610-11* (upholding constitutionality of sign code that banned all offsite commercial advertising); see also *Ackerley Communications of the Northwest, Inc. v.*

Krochalis, 108 F.3d 1095, 1099 (9th Cir. 1997) (upholding Seattle's ban on off-premises advertising signs).

AFFIRMED.

MEMORANDUM *

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

n1 The Ontario official processing Rich's permit classified her signs as offsite commercial signs or billboards. Rich does not argue that her signs were wrongly classified. She suggests, however, that the city official had "unfettered discretion" to classify her signs as billboards.

Merely because a government official must classify speech as either commercial or noncommercial for the purpose of carrying out a regulation does not render the regulation unconstitutional. See *Outdoor Sys., 997 F.2d at 613* (noting that judicial precedent defining commercial speech provides a definite standard for classification of speech as either commercial or noncommercial).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CV 99-1529 SVW (SHX)

KIMBERLY A. RICH, an individual doing business as Outdoor Media Dimensions,

Plaintiff

v.

CITY OF ONTARIO

Defendant.

Date: 5/4/99

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

I. BACKGROUND

This case challenges the ordinance under which the City of Ontario ("City") issues permits for signs and billboards. In particular, Plaintiff Kimberly Rich ("Rich") alleges that the ordinance is unconstitutional because it does not require prompt decisions by the City or provide for expedited judicial review.

Defendant moves to dismiss, contending that as a matter of law there is no requirement for such procedural safeguards in the regulation of signs and billboards. The Court has reviewed both the jurisprudence relating to prior restraints and the jurisprudence relating to the regulation of signs and

billboards, and the Court agrees with the City. The Court finds that the City's regulation of billboards does not imbue the City with any meaningful discretion. As result, the Court finds that the City's regulation of billboards does not constitute a. prior restraint and the regulation of billboards is therefore not required by the U.S. Constitution to include the procedural safeguards required for prior restraints.

As there are no federal claims remaining in the case, the Court declines to exercise supplemental jurisdiction over the claims under the California State Constitution.

II. FACTS

In evaluating a motion to dismiss, the Court must take all facts alleged in the Complaint as true and must draw all reasonable inferences in favor of the non-moving party. However, the Court need not accept conclusory allegations. Moreover. the Court may consider items attached to the Complaint, or referenced within the complaint. under that standard, the Court evaluates the facts of the case follows:

The City of Ontario regulates the display of signs under Article 31 of the. City of Ontario Development Code. Pursuant to that Code, billboards are prohibited in the City. The ordinance defines a billboard as a specified type of sign which is not related to a use, structure, and activity on the site wherein the sign is located The ordinance also contains a provision that, in any location where a sign is permitted, a non-commercial sign is permitted.fn1

The Code requires those seeking to erect new signs to obtain a permit from the City, and there is no requirement that the City decide on a permit application within any specific time period.

Likewise, there is no provision allowing for judicial review of the City's approval or rejection of a sign application.

Plaintiff Rich does business under the fictitious business name "Outdoor Media Dimensions." On November 13, 1998, Rich submitted seven written applications to the City seeking seven sign permits to display seven signs within the city of limits of the City Nothing in the application requested that Plaintiff identify the content of the billboard.

On the same day as Plaintiff submitted her applications, an employee of the City wrote "NEW BILLBOARD" on each application and denied the applications.

LEGAL ANALYSIS

A. Standard for Rule 12(b) (6) Motion to Dismiss

Rule 12(b) (6) of the Federal Rules of Civil Procedure provides a mechanism for a party to dismiss a claim if the claimant failed to state a claim upon which relief can be granted. Rule 12 (b) (6) A 12 Kb) (6) dismissal will not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Thus, in evaluating a complaint, only its legal sufficiency, and not the weight of the evidence supporting it, may be considered. Furthermore, a court must accept as true all factual allegations in the complaint. Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 164 (1993). However, "[i]f a complaint is accompanied by attached documents, the court is not limited by the allegations contained in the complaint. These documents are part of the complaint and. may be considered in determining whether the plaintiff can prove any set of facts in support of the claim." First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987) (citations omitted), cert. denied, 484

U.S. 944 (1987). Moreover, "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered.." Branch v. Tunnel, 14 F.3d 449, 454 (9th Cir. 1994). cert. denied, 512 U.S. 1219 (1994)

Plaintiff Does Not State a Due Process Violation

In her Opposition to the present Motion to Dismiss, Plaintiff explains that she is not proceeding under the First Amendment but rather that she believes the City's ordinance violates the Fourteenth Amendment requirement of Due Process. Plaintiff argues that the ordinance constitutes a prior restraint of speech and that no prior restraint is valid unless it has the procedural protections described by the Supreme Court in Freedman v. Maryland, 310 U.S. 51 (1965), most recently by the Ninth circuit in Baby Tam Co. v. City of Las Vegas, 154 F.2d 1097 (9th Cir. 1999) . In other words, Plaintiff argues that the ordinance is invalid because it does, not contain a deadline for action on the application and it does not contain a provision for judicial review. Without those procedures, Plaintiff alleges that the statute is procedurally inadequate and that Plaintiff was therefore denied process that was due to her.fn2

1. The Permit Required in the Ordinance Is Not A Prior Restraint

Although Plaintiff claims not to be pursuing a First Amendment violation, the Plaintiff's claims for due process are clearly grounded in the First Amendment because the procedures that Plaintiff alleges were required would only be required to protect First Amendment. rights. In particular, the procedures allegedly required would only be required if the governmental actor were going to impose a "prior restraint." As such, the Court is required to evaluate whether the ordinance would constitute a prior restraint under the First

Amendment.

Plaintiff essentially contends that the ordinance at issue is a prior restraint because it constitutes a restriction on speech imposed before the speech is made. Although these attributes are part of the definition of a prior restraint, these attributes alone do not establish that a governmental restriction is necessarily a "prior restraint" within the meaning of First Amendment jurisprudence. For example, these attributes are also included in any valid "time, place, and manner" restriction, because a "time, place, and manner" restriction is also a limitation on speech imposed before the speech is made. Of course, "time, place and manner" restrictions do not require the same procedural safeguards as "prior restraint" restrictions .

The critical feature that makes a restriction into a "prior restraint" arises when the restriction at issue impermissibly discriminates between types of speech or when it allows the decision maker unreasonable discretion to impermissibly discriminate between different types of speech or speakers. See e.g. Abel v. Town of Orangetown, 759 F. Supp. 161, 163-164 (S.D.N.Y. 1991) (observing that content-neutral ordinance is evaluated as time, place or manner restriction while content discrimination will be prior restraint). The classic discussion of prior restraint comes from the Supreme Court's decision in Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51 (1969):

This ordinance as it was written, therefore, fell squarely within the ambit of the many decisions of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional. "It is settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms

which the constitution guarantees contingent upon the uncontrolled will of an official--as by requiring a permit or license which may be granted or withheld in the discretion of such official- -is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms,"

quoting Staub v. City of Baxley, 355 U.S. 313, 322 (1958) (emphasis added)

It is the lack of "narrow, objective, and definite" standards which makes a limitation on speech into a "prior restraint" because the lack of such standards allows the government freedom in which to discriminate. By contrast, where "narrow, objective, and definite" standards exist, the restrictions at issue will not be a prior restraint.

In the instant case, the ordinance provides "narrow, objective, and definite" standards for which signs constitute prohibited "billboards." The definition of a billboard describes precisely the construction and size of signs which qualify as "billboards... " It is true that the ordinance permits on-site signs, but there is no exercise in discretion involved in deciding whether or not the sign is an on-site sign, and there is nothing impermissible about the permission of on-site signs while forbidding off-site signs, so long as such an ordinance does not discriminate unduly between commercial speech and non-commercial speech. Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981); Ackerly Communications of the Northwest, Inc. v. Krochalis, 108 F.3d 1095, 1097-98 (9th Cir. 1997)

The, application itself does not request the content of the proposed sign, and there is no indication on that application which would provide the City with an opportunity for impermissible discretion. The ordinance does make one significant content distinction in that it distinguishes between commercial and non commercial speech. It is true that a

restriction on commercial speech may ultimately require some reasonable justification by the City of Ontario pursuant to Central Hudson Gas & Elec. Corp. v. Public Serv. Comm. of New York, 447 U.S. 557 (1980), and its progeny. However, the fact that the restriction may ultimately be challenged does not mean that the restriction gives rise to the sort of invidious discretion that the Court considers necessary for a "prior restraint."fn3 Indeed, the Ninth. Circuit has explicitly held that the standards behind this distinction are "narrow, objective, and definite" within the meaning of Shuttlesworth. Outdoor Sys. Inc v. City of Mesa, 997 F.2d, 604, 613. (9th Cir. 1993) .fn4 In short, there is nothing in the ordinance that impermissibly discriminates on the basis of content or which provides the City with unbridled discretion with which to discriminate.fn5

As a consequence, the licensing scheme at issue in this case does not constitute a prior restraint and there is therefore no due process violation because the process requested by Plaintiff is not necessary.

2. The Ninth Circuit Has Already Established That Billboard Licensing Does Not Inherently Require the Freedman Safeguards

The Court would add that, even if it were inclined to reach an opposite conclusion, it would be bound by the Ninth Circuit's ruling in Outdoor Sys. Inc. that billboard licensing schemes do not require the Freedman safeguards. 997 F.2d at 613.

Plaintiff argues that the Ninth Circuit's more recent ruling in Baby Tam & Co v. City of Las Vegas, 134 F.3d 1097, 11O2 (9th Cir. 1998), essentially overrules the Outdoor Sys. Inc. decision. In Baby Tam the Ninth Circuit reaffirmed the vitality of the procedural safeguards required in the event of a prior restraint by Freedman v. Maryland, 380 U.S. 51 (1965) and its progeny. The Court agrees with Plaintiff that the

language in these decisions is quite general and appears to require these procedural. safeguards for any prior restraint

Nevertheless, Defendant is correct in observing that in First Amendment law, the requirements imposed by the First Amendment are often specific to the particular medium at issue, This is because "[e]ach method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method." Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 501 (1981) (quoting Kovacs v. Cooper, 336 U.S. 77, 97 (1949)) The law for municipal regulation of signs and billboards is a well established jurisprudence. Ackerley communications of the Northwest Inc. v. Krochalis, 108 F.3d. 1095, 1099 (9th Cir. 1997), And, as the Ninth. Circuit has indicated, a court cannot and should not presume in the absence of a clear indication to the contrary that decisions related to other media will modify established case-law in the jurisprudence of signs and billboards. Ackerley Communications, 105 F.3d at 1099 (9th Cir. 1997) (quoting Metromedia and holding that the Metromedia law of billboards is binding notwithstanding possible changes, in Supreme Court doctrine in other areas) fn6

The decision in Baby Tam, like the Freedman and FW/PBS decisions upon which it relies, is a case that arose out of the regulation of adult speech. By contrast, the present case arises out of the regulation of billboards. In light of Ackerley, the Court must follow direct Ninth Circuit precedent as expressed in Outdoor Sys., Inc. 7 And Outdoor Sys., Inc. has established that the Freedman safeguards are not required for billboard regulation. Because Defendant was not required to give such process to the Plaintiff, there is no due process violation.

C. The Court Declines to Exercise Supplemental

Jurisdiction over the California State Constitutional Claim

As discussed above, the Court finds as a matter of federal constitutional law that the Freedman safeguards are not required both because the ordinance at issue is not a prior restraint and because the Ninth Circuit precedent on point is conclusive.9 Plaintiff also advances a theory under the California State Constitution, citing Hillman v. Britton, 111 Cal. App.3d 810, 168 Cal. Rptr. 852, 959-60 (1980)

The Court is unwilling to presume that the California State Constitution necessarily follows the Federal Constitution on this issue. However, the Court also believes that the California State courts are, when possible, the preferred forum in which to address issues under the California State Constitution. As there is no longer a basis for federal jurisdiction, the Court will dismiss the remainder of the suit such that Plaintiff nay bring her California claims in a California State forum.

CONCLUSION

The Court hereby DISMISSES the complaint.

IT IS SO ORDERED.
DATED
STEPHEN V. WILSON UNITED STATES DISTRICT JUDGE

Footnotes

1. The Plaintiff also points out that, pursuant to section 9-1.3110(k), "[h]oliday lights and displays not advertising any business establishment, product, or commercial activity" are exempt from the ordinance. From this, Plaintiff would conclude that holiday signs are permitted anywhere in the city, and therefore non-commercial signs are permitted

anywhere in the city.

The Court does not interpret the ordinance in the same way because the Court does not believe that..."holiday displays" are "permitted signs," This is so both because holiday displays are not generally signs at all, and because an exempt sign is not the same thing as a permitted sign.

2. Plaintiff in her Complaint indicated that she was challenging the ordinance both "facially" and "as applied." These are terms of art from First Amendment jurisprudence, and the Court is less than certain how they would apply in a due process challenge. In any event, the gravamen of the Plaintiff's complaint is the lack of specific procedural protections and the court finds that such procedural protections are not required in this case.

3. The Court notes that all regulations on speech may be challenged, even "time, place, and manner" regulations. The Court also notes that the City's burden under.. Central Hudson is considerably less exacting than the burden of justifying a prior restraint against the presumption of unconstitutionality.

4. The Court is aware that the Supreme Court's decision in City of Cincinnati v. Discovery Network Inc., 507 U.S. 410 (1993), has called into question the right to automatically discriminate between commercial and non-commercial speech. In Discovery Network the Supreme Court held that a Cincinnati ordinance that distinguished between conventional newspaper racks and commercial newspaper racks was not content-neutral and therefore not a "time, place, and manner" regulation. 507 U.s. at 429. The Court then held that the ordinance did not meet the intermediate scrutiny requirements established for the regulation of commercial speech by Central Hudson and its progeny.
Although Discovery Network would appear to preclude a

finding that the ordinance at issue here is a "time, place, and manner" regulation, the Court does not believe that a regulation must be a prior restraint if it is not a "time, place, and manner" restriction. The procedural safeguards required for prior restraints are required in order to restrict potentially covert or unanticipated exercises of discretion. In this case, as discussed below, there is little danger that the ordinance at issue provides a smoke screen for unbridled or covert discretion. As a result, the ordinance is simply not a "prior restraint" as that term, is used in First Amendment jurisprudence.

In this Order, the Court does not address the question of whether the City of Ontario can ultimately justify the distinction between commercial and non-commercial speech. The Court simply concludes that the ordinance does not vest the City with impermissible discretion (and is not impermissibly targeted) and therefore does not constitute a prior restraint.

5. The Court acknowledges that the plurality decision in FW/PBS Inc. v. Dallas, 493 U.S. 215 (1990) argues that the lack of a deadline may itself provide discretion to the decision—maker and therefore make a licensing scheme into a prior restraint. However, FW/PBS arose out of a licensing scheme for adult bookstores, which inherently provided the decision-maker with information about the content of the speech at issue. Moreover, adult speech is an area in which particular First Amendment sensitivity is required in light of the tendency for government to desire to suppress it (or to delay decisions permitting such speech). As such, any discretion at all may be too much in the realm of adult speech. By contrast, there is much less tear of covert hostility to commercial speech and licensing schemes for commercial speech in billboards and signs will not require the same extreme level of vigilance. See Outdoor Sys. Inc., 997 F.2d at 613 (holding that billboard licensing scheme need

not require response within specifically limited period of time).

The Court also observes that a decision by one panel of the Ninth Circuit may not overrule the decision of another. United States v. Gay 967 F.2d 322, 327 (9th Cir.1992) ("As a general rule, one three-judge panel of this court cannot reconsider or overrule the decision of a prior panel.") (citation and internal quotations omitted) As such; even if Baby Tam could be construed in a way that would overrule Outdoor Sys., Inc. (a construction to which the Court would not be inclined to subscribe), the. Court would not so construe Baby Tam.

7. The Court also notes that the Ninth circuit decided Outdoor Sys., Inc. after the Supreme Court decisions in FW/PBS and Discovery Network. As such, the Court will presume that Outdoor Sys., Inc. was decided with full consideration given to these decisions.

8. The Court does not mean to suggest that the two are necessarily exclusive grounds. The Ninth Circuit's decision in Outdoor Sys., Inc. does not fully articulate its basis for holding that the Freedman safeguards were unnecessary, but the Court understands that decision as based on an assumption that the billboard regulation at issue was not a prior restraint.

No. 99-55958
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KIMBERLY A. RICH,
Plaintiff-Appellant,

v.

CITY OF ONTARIO,

Defendant-Appellee.

ORDER

Date: 7/30/01

Before: BEEZER, T.G. NELSON and BERZON, Circuit Judges.

Judges T. G. Nelson and Berzon have voted to deny the petition for rehearing en banc and Judge Beezer so recommends.

The full court has been advised of the petition for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc. Fed. R. App.P.35.

The petition for rehearing en banc is DENIED.

Table 31-8 — Sign Permit Requirements and Approval Process				
Sign Types	Approval Required	Time Frame	Approval By	Appeal
Banners, flags, similar displays	Sign permit	45-day limit, three (3) times per year	staff	ZA
Real estate (R, C, M Districts)	None	Five (5) days after sale/lease of site	none	n.a.
Off-site subdivision	Sign permit	Same as above	ZA	DAB
Off-site business	Sign permit	As required by PC	PC	CC
Permanent Signs				
Subdivision/multi-family complex identification	Sign permit	N/A	Staff	ZA
Murals/painted wall displays	Sign permit	N/A	ZA	PC
All other signs in C, M, PF, P1, OS, SP, EAD Districts (including Master Sign Plans)	Sign permit	N/A	Staff	ZA
Staff = Ontario Planning Department Staff ZA = Zoning Administrator DAB = Development Advisory Board PC = Planning Commission CC = City Council				

Cal Code Civ Proc § 1094.8 (2001)

§ 1094.8. Review of First Amendment permit or entitlement decision

(a) Notwithstanding anything to the contrary in this chapter, an action Or proceeding to review the issuance, revocation, suspension, or denial of a permit or other entitlement for expressive conduct protected by the First Amendment to the United States Constitution shall be conducted in accordance with subdivision (d).

(b) For purposes of this section, the following definitions shall apply:

(1) The terms "permit" and "entitlement" are used interchangeably.

(2) The term "permit applicant" means both an applicant for a permit and a permitholder.

(3) The term "public agency" means a city, county, city and county, a joint powers authority or similar public entity formed pursuant to Section 65850.4 of the Government Code, or any other public entity authorized by law to issue permits for expressive conduct protected by the First Amendment to the United States Constitution..

(C) A public agency may, if it so chooses, designate the permits or entitlements to which this section applies by adopting an ordinance or resolution which contains a specific listing or other description of the permits or entitlements issued by the public agency which are eligible for expedited judicial review pursuant to this section because the permits regulate expressive conduct protected by the First Amendment to the United States Constitution.

(d) The procedure set forth in this subdivision, when applicable, shall supersede anything to the contrary set forth in this chapter.

(1) Within five court days after receipt of written notification from a permit applicant that the permit applicant will seek judicial review of a public agency's action on the permit, the public agency shall prepare, certify, and make available the administrative record to the permit applicant.

(2) Either the public agency or the permit applicant may bring an action in accordance with the procedure set forth In this section, If the permit applicant brings the action, the action shall be in the form of a petition for writ of mandate pursuant to Section 1085 or 1094.5, as appropriate.

(3) The party bringing the action pursuant to this section shall file and serve the petition on the
(4) The clerk of the court shall set a hearing for review of the petition no later than 25 calendar days from the date the petition is filed. Moving, opposition, and reply papers shall be filed as provided in the California Rules of Court. The petitioner shall order the administrative record with the court no later than 10 calendar days in advance of the hearing date.

(5) Following the conclusion of the hearing, the court shall render its decision in an expeditious manner consistent with constitutional requirements in view of the particular facts and circumstances. In no event shall the decision be rendered later than 20 calendar days after the matter is submitted or 50 calendar days after the date the petition is filed pursuant to paragraph (4), whichever is earlier,

(e) If the presiding judge of the court in which the action is filed determines that, as a result of either the press of other

court business or other factors, the court will be unable to meet any one or more of the deadlines provided within this section, the presiding judge shall request the temporary assignment of a judicial officer to hear the petition and render a decision within the time limits contained herein, pursuant to Section 68543.8 of the Government Code. Given the short time period involved, the request shall be entitled to priority.

(f) In any action challenging the issuance, revocation, suspension, or denial of a permit or entitlement, the parties to the action shall be permitted to jointly waive the time limits provided for herein.